



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: MARCH 15, 2023

IN THE MATTER OF:

Appeal Board No. 627019

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective July 8, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by JANIE L BRADLEY CPA prior to July 8, 2022 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the employer. By decision filed December 9, 2022 (), the Administrative Law Judge granted the claimant's application to reopen A.L.J Case No. 022-22284, and overruled the initial determination.

The employer appealed the Judge's decision to the Appeal Board, insofar as it overruled the initial determination disqualifying the claimant from receiving benefits on the basis that the claimant lost employment through misconduct in connection with that employment.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed full time as an administrative assistant by the employer Certified Public Accountant (CPA) office for more than three and a half years. She was paid \$23 per hour. The claimant held a "Commissioner of Deeds" license that authorized her to notarize documents in the five boroughs of New York City. The employer's office was located in

Brooklyn. Among the claimant's job responsibilities was to notarize signatures for the employer's clients and anyone who walked into the office needing a signature notarized, as this was a service offered by the employer since she opened her business in 2003. Also since the inception of her business, the employer had an agreement with her employees that any fees collected for notarizing documents would be divided equally between the employee and the employer, with the employer's portion going into the office's petty cash. The employer and the claimant had this agreement and arrangement since the claimant was hired in January 2019.

In late December 2021, the employer noticed that the claimant was not splitting the \$2 fee she received for notarizing documents, and questioned the claimant. The claimant responded that it was not legal for the employer to ask her to split the fees she received, basing her position on information she received from someone in the city clerk's office. The employer told the claimant that the fee-splitting arrangement had always been a policy in her office, and would continue to be.

Shortly thereafter, in early 2022, the claimant misplaced her notary stamp, and was unable to notarize signatures. By the time she located her stamp, the claimant's commission had expired in March 2022, and the claimant did not receive her certificate of renewal until June 2022. As a result, from January 19 to July 1, 2022, including during the employer's busy tax season, the claimant was unable to provide notary services for the employer's clients and others. As of the beginning of July 2022, when the claimant had her tools and renewed license, the employer reiterated the employer's policy regarding the splitting of fees, adding that the claimant was on the employer's time clock when performing notary services.

In a conversation on or about July 5, 2022, the claimant told the employer that maybe she should just clock out every time she notarized something, and clock back in when she was finished so she would not have to split the \$2 fee she received. Although the employer initially responded that maybe that was not a bad idea, after consideration she concluded that such an arrangement would be troublesome and problematic for timekeeping purposes. On July 7, 2022 the claimant clocked out at 10:50 AM and clocked back in at 10:56 AM, providing notarization services during that six minute period. Immediately thereafter, the employer told the claimant that the claimant's clocking in and out suggestion was not going to work, and reiterated that it was, and would continue to be, the employer's policy that fees would be equally divided. The

owner told the claimant that if she was not willing to do that, she could no longer work for the employer. The claimant continued to assert her position that she was not going to split fees with the employer. The employer asked for the office keys, and told the claimant to leave.

OPINION: The credible evidence establishes that the claimant was discharged because she stopped complying with the employer's office policy pertaining to the splitting of fees the claimant received when performing commissioner of deeds functions for the employer, and refused to adhere to that policy. It is significant that providing notary/commissioner of deeds services was among the claimant's job responsibilities as administrative assistant at the employer's CPA office, and that the claimant was aware of the employer's "fee-splitting" policy at hire. It is also noteworthy that the claimant had adhered to that policy for three of the three and a half years of her employment, without complaint or indicating any disagreement with the arrangement.

We find that employer's longstanding policy was not unreasonable, and that despite the claimant's reading of the documentation she received from the American Association of Notaries, there is nothing indicating that the arrangement the employer had with her employees was illegal. Rather, that documentation states that it is acceptable for an employer to insist that any notary fees collected during the business day belonged to the employer, indicating that it is advisable that the employee and employer come up with a plan

that can be uniformly applied. The employer and the claimant had, for three years, operated pursuant to such a plan and office policy, until the claimant decided she would no longer do so.

We are not persuaded that the employer's agreement to deviate from the established office policy for a day or two before realizing that the situation would not work, represented a change in the employer's policy. It is not dispositive that the employer allowed the claimant to clock in and out for purposes of notarizing a document on one occasion before realizing that such an arrangement was not a feasible option for the efficient operation of the employer's business. What is dispositive is that the employer had a reasonable, and permissible, policy regarding the splitting of the fees the claimant received in the performance of her Commissioner of Deeds services while she was working, which the claimant accepted at the time of hire, and to which she had adhered for three years. We find that the claimant's decision

that she would no longer adhere to the employer's reasonable policy, without any compelling reason for her refusal, and although she knew that her failure to follow policy would jeopardize her job, was insubordinate behavior, and constitutes misconduct for unemployment insurance purposes. Accordingly, we conclude that the claimant was separated from employment under disqualifying circumstances.

DECISION: The decision of the Administrative Law Judge, insofar as appealed from, is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective July 8, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to July 8, 2022 cannot be used toward the establishment of a claim for benefits, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER